STATE OF MICHIGAN

COURT OF APPEALS

RONALD K. MATTHEWS, PATRICIA A. MATTHEWS, and MINNIE MAE MATTHEWS,

Plaintiffs/Counter Defendants-Appellants/Cross Appellees,

v

PATRICIA WINSTANLEY and MARK MARZETTI,

Defendants/Counter Plaintiffs-Appellees/Cross Appellants,

and

BLOOMFIELD HIGHLAND SUBDIVISION HOMEOWNERS ASSOCIATION, JOSEPH DOE, and JANE DOE,

Defendants/Counter Plaintiffs-Not Participating.

UNPUBLISHED
December 18, 2003

No. 242472
Oakland Circuit Court
LC No. 2001-035539-CH

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

This is an action for declaratory relief to invalidate a deed restriction limiting plaintiffs' property to residential usage. Defendants Patricia Winstanley and Mark Marzetti filed separate counterclaims, seeking to enforce the same restriction. The trial court granted defendants summary disposition of plaintiffs' complaint pursuant to MCR 2.116(C)(8), and granted defendants summary disposition of their countercomplaint pursuant to MCR 2.116(C)(10). Plaintiffs appeal as of right. Defendants cross-appeal the trial court's denial of their request for sanctions. We affirm.

Plaintiffs first argue that the trial court erred in denying their motion to certify a class of defendants, consisting of all persons with an interest in one of the fifty-nine subdivision lots subject to the deed restriction. Plaintiffs argue that all members of the proposed class are necessary parties and should not be permitted to opt out of the class. We find it unnecessary to reach this issue because we conclude that the trial court properly granted summary disposition to

defendants on the complaint and countercomplaint. Therefore, this issue is moot.[1] See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003).

Plaintiffs next argue that the trial court erred in granting defendants summary disposition on the complaint and countercomplaint.[2] We disagree. A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994).

A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the claim and may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In contrast, when reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

The issue whether to set aside or enforce a deed restriction involves a balancing of competing policies. Michigan has a "strong . . . public policy, . . . well-grounded in the common law[,] . . . supporting the right of property owners to create and enforce covenants affecting their own property." *Terrien v Zwit*, 467 Mich 56, 70-71; 648 NW2d 602 (2002). Restrictions for residential purposes are particularly favored by public policy and are valuable property rights. *Livonia v Dep't of Soc Serv's*, 423 Mich 466, 525; 378 NW2d 402 (1985); see, also, *Terrien*, *supra* at 71-72. Courts must normally enforce unwaived restrictions on which the owners of other similarly burdened property have relied. *O'Connor v Resort Custom Bldrs, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999); see, also, *Terrien*, *supra* at 72.

Nonetheless, "owners of land have broad freedom to make legal use of their property." *O'Connor*, *supra* at 343. Thus, negative covenants "are to be strictly construed against the would-be enforcer, . . . and doubts resolved in favor of the free use of property." *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997); see, also, *O'Connor*, *supra* at 341-342. Courts will not grant equitable relief unless there is an obvious violation. *Stuart*, *supra* at 210. Each case must be decided on its own facts. *O'Connor*, *supra* at 343, 345.

Plaintiffs rely on *DeMarco v Palazzolo*, 47 Mich App 444; 209 NW2d 540 (1973), in support of their position that the deed restriction limiting their property to residential use should no longer be enforced due to changes to the surrounding area. In *DeMarco*, the plaintiffs, whose lots fronted Ten Mile Road, sought to set aside covenants limiting their land use to residential

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[1] This issue does not involve a question of public significance that is likely to recur, yet evade judicial review. See *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001).

[2] We disagree with plaintiffs' argument that, once summary disposition was granted to defendants on plaintiffs' complaint, there was no actual controversy justifying defendants' countercomplaint. See *Allstate Ins Co v Hayes*, 442 Mich 56, 65-67; 499 NW2d 743 (1993).

purposes. Although the subdivision was "pastoral" in the 1950's, when plaintiffs purchased their homes, the construction of the Ford Freeway had since "substantially eradicat[ed] the subdivision." *Id*. at 445-446. Ten Mile Road had changed from a two-lane street to "a four-lane thoroughfare, funneling traffic across the freeway at the rate of 24,000 vehicles per day." *Id*. at 446. All other properties fronting Ten Mile Road had been converted to commercial uses. *Id*. The defendants, fellow residents of the subdivision, lived in lots fronting a side street, not Ten Mile Road. *Id*. at 445.

The issue before this Court was "whether changes *outside* a covenanted subdivision may be considered in determining whether enforcement of reciprocal negative easements such as those here involved would still benefit a dominant estate." *Id*. at 446 (emphasis in original). This Court noted that there is "an apparent split of authority . . . on this recurring problem." *Id*. It found that one line of cases "hold[s] [that] changes in land use outside covenanted property are *not* relevant" because other similarly burdened homeowners have relied on the deed restriction and are entitled to protection, regardless of how close business may crowd around them on unrestricted property, provided that the restriction has been generally enforced and complied with. *Id*. at 446-447 (emphasis original). It also found that an "equally compelling, longstanding and current line of authority holds [that] considerations of land use patterns of surrounding property *are* relevant to the determination of the enforcement of a restrictive covenant." *Id*. at 447 (footnote omitted). Quoting *Windemere-Grand Improvement & Protective Ass'n v American State Bank of Highland Park*, 205 Mich 539, 548; 172 NW 29 (1919),[3] this Court in *DeMarco, supra* at 447, observed:

> Certainly, no decree of this [C]ourt can retain or restore the quiet suburban conditions existing and contemplated when those residential restrictions were imposed. It cannot eliminate the 'vast growth of manufacturing and business institutions out there,' and invasion of traffic which has made '*all Woodward* [*A*]*venue in that vicinity*' *an exceptionally noisy and busy street*. This unforeseen and radical change in condition and character of the street has defeated the object and purpose of the restrictive covenants upon this lot, that had relations to protecting the home, or dwelling house, and equity does not now, under the concessions and facts shown, demand that defendant be enjoined from improving and using as proposed this lot thus made worthless for residential purposes. [Emphasis added.]

While attempting to balance the rights of the parties, the Court in *DeMarco* recognized that "restrictive covenants are not merely intended to apply and be enforced only so long as it is convenient to do so" and that "it is just as certain that restrictive covenants ought not to be enforced when enforcement protects no one." *DeMarco, supra* at 448. The Court stated:

> The trial court's opinion clearly makes reference to changes in land use outside the subdivision *as they have affected the conditions inside the covenanted*

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[3] The parties in *Windemere* had agreed to set aside the residential restriction, and the only dispute concerned the applicability of a setback restriction. See *Windemere, supra* at 541-542, 546-548.

> *area*. That is, the traffic, dirt, noise, and inconvenience of the nearby commercialization on Ten Mile Road and along the Edsel Ford Freeway is already an established detriment, for which defendants have no remedy. Thus, the benefit of the restrictive covenant to the remaining residential owners has been substantially impaired. [*Id*.]

This Court affirmed the trial court's decision declining to enforce the restriction, but requiring the plaintiffs to construct a green belt to protect the defendants' lots. *Id*. at 448-449.

Conversely, defendants rely on *Rofe v Robinson (After Remand)*, 415 Mich 345, 347; 329 NW2d 704 (1982), wherein the trial court enforced a covenant restricting subdivision lots to single family residential uses. The lots in question fronted Telegraph Road, they had always been vacant, had been zoned for office use—"prohibiting the construction of single-family residences"—and their depth had been diminished by fifty-four feet during the widening of Telegraph Road. *Id*. at 347-348. Thus, even if it were legal to build a home there,[4] it was impractical—but apparently not impossible—for the lots to accommodate single family homes meeting the subdivision's size and setback restrictions, plus the wide curb cuts necessary for safe egress to and from Telegraph Road. *Id*. at 348-349. But the Court concluded that economic impracticability does not justify lifting a deed restriction. *Id*. at 350.

The defendants in *Rofe* argued that, because the zoning of the lots had been changed, a nearby home in the same subdivision was being used as an office, and Telegraph Road had been substantially widened and commercialized, "the character of the subdivision ha[d] changed so that enforcement of the restrictions would be inequitable." *Id*. at 351. The Supreme Court disagreed, stating that "restrictions will not be lifted unless the character of the subdivision has changed in such a way as to subvert the original purpose of the restrictions." *Id*. at 352. Rezoning, by itself, is not such a change. *Id*. Similarly, the office use of a former single family dwelling "ha[d] not materially changed the character of the subdivision" so as to justify setting aside the restriction. *Id*. at 352-353.

Most relevant to the present case, the Court found that "the evolution and widening of Telegraph Road d[id] not justify lifting the restrictions." *Id*. at 353. The Court explained:

> The widening of Telegraph Road has not changed the character of the subdivision. The subdivision is still substantially residential. Similarly, the evolution of Telegraph Road into a business district has not rendered enforceability of the restrictions inequitable, because the subdivision has not lost its character as a residential area. "The fact that substantial changes in the character of the neighborhood outside the subdivision have taken place does not make it inequitable to enforce the restrictions." Furthermore, . . . "there must of necessity be a dividing line somewhere." [*Id*. at 353, quoting *Monroe v Menke*,

[4] The Court intimated that attempting to override deed restrictions by a change in zoning might be considered an unconstitutional impairment of contracts. See *Rofe*, *supra* at 351 n 6.

314 Mich 268, 273; 22 NW2d 369 (1946), and *Redfern Lawns Civic Ass'n v Currie Pontiac Co*, 328 Mich 463, 470; 44 NW2d 8 (1950).]

The Court also stated that to allow the lifting of a restriction on the basis of changes to the surrounding neighborhood "would only cut down this desirable residential area and create another buffer area." *Rofe*, *supra* at 353-354 n 13.

The Court in *Rofe* noted that there was "no business section adjoining defendants' lots"; rather, the adjoining lots had remained residential. *Id*. at 354 n 13. The Court added that enforcement of the restrictions might have been denied "if there had been a 'complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots[.]" *Id*. at 355 n 14. However, the change in the character of Telegraph Road had not subverted the purpose of the residential restrictions so as to render enforcement of the restrictions inequitable. *Id*. at 354-355.

The *Rofe* Court further stated that "[t]he right, if it has been acquired, to live in a district uninvaded by stores, garages, business and apartment houses is a valuable right." *Id*. at 350. "Deed restrictions are [valuable] property rights" and "[t]he courts will protect those rights if they are of value to the property owner asserting the right and if the owner is not estopped from seeking enforcement." *Id*. at 349.

In the present case, plaintiffs' lots front Woodward Avenue. Their complaint alleges that "[t]here has been extensive change in the character of the neighborhood in which the subdivision is located such that the original purpose of the deed restriction cannot be achieved." Plaintiffs also allege that "the deed restrictions no longer serve any useful purpose" and that their removal "would cause no detriment or loss of value" to defendants. In particular, plaintiffs allege that Woodward Avenue has become an eight-lane major thoroughfare carrying heavy volumes of traffic, including many trucks. Plaintiffs also note that homeowners in a "sister" subdivision on the other side of Woodward Avenue entered into a consent decree in 1971 allowing commercial development on the lots fronting Woodward Avenue. There are also commercial and nonresidential developments on Woodward Avenue to the east and southeast of plaintiffs' lots, including a church and hospital located within a quarter-mile of plaintiffs' lots. Lastly, except for the subdivision where the parties live, the zoning on Woodward is commercial.

As in *DeMarco*, plaintiffs allege that Woodward Avenue has changed substantially since the lots were platted. However, unlike in *DeMarco*, plaintiffs do not allege that the subdivision has been substantially eradicated. Further, plaintiffs do not argue that their lots have been rendered unfit for residential use due to excessive noise, traffic, dust or other harmful conditions resulting from the commercialization and expansion of Woodward Avenue. Plaintiffs also cannot claim that enforcing the deed restriction would protect no one. It is undisputed that, while lifting the restriction may not hurt defendants' property values, enforcing it would protect defendants' exclusively residential environment while lifting it would likely destroy it.

The circumstances considered by the Supreme Court in *Rofe* are much more compelling than those presented here, yet the Court concluded that it was nevertheless required to enforce the deed restriction. Moreover, there is no claim here that the restriction has been waived or otherwise invalidated by inconsistent uses within the subdivision. Even if we conclude that the allegations in plaintiffs' complaint were sufficient to withstand summary disposition under MCR

2.116(C)(8), we agree that plaintiffs failed to show a genuine issue of material fact concerning whether conditions existed that might warrant setting aside the deed restriction or that might prevent a court from enforcing it. Therefore, summary disposition was properly granted to defendant under MCR 2.116(C)(10).

On cross-appeal, defendants argue that the trial court erred in denying their request for sanctions. Defendants further argue that sanctions should be assessed against plaintiffs on appeal. We disagree. A trial court's finding whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

Although we conclude that defendants were entitled to judgment as a matter of law, we are not persuaded that plaintiffs' complaint, their motion to certify a class, their briefs in opposition to defendants' motions, or this appeal were frivolous. See MCL 600.2591; MCR 2.114; MCR 2.625. Moreover, it is not apparent that plaintiffs interposed this action for an improper purpose. See MCR 3.501(A)(3) and (4). We cannot conclude that the trial court erred in denying defendants' request for sanctions, and we also decline the parties' requests for sanctions on appeal. See MCR 7.216(C)(1).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell